Supreme Court, U.S.
FILED
FEB 6 - 2004
OFFICE OF THE CLERK

(2)

No. 03-596

IN THE

# Supreme Court of the United States

BRIAN GOODINE,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

*Amicus curiae* National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with more than 10,000 attorney-members nationwide and 80 state and local affiliate organizations with 28,000 members in all 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. Founded in 1958, NACDL promotes study and research in the field of criminal law and procedure, disseminates and advances legal knowledge in the area of criminal justice and practice, and encourages the integrity, independence and expertise of criminal defense lawyers in the state and federal courts.

*Amicus curiae* Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan organization with 28,000 members and 44 chapters nationwide. FAMM conducts research, promotes advocacy, and educates the public regarding the excessive financial and social cost of mandatory minimum sentencing. The cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities and disproportionate sentences. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime and the culpability of the offender. FAMM therefore has a special interest in ensuring that sentencing law and practice result in just outcomes and that sentences be arrived at in a manner consistent with statutory and constitutional mandates.

*Amicus curiae* National Association of Federal Defenders (NAFD) is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of the Federal Defender Offices. The NAFD was formed in 1995 to enhance the representation provided under the Criminal Justice Act and the Sixth Amendment of the United States Constitution. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent

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[1] Counsel for a party did not author this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief, and copies of those consents have been filed with the Court.

defendants in the criminal justice system is adequately represented. A large percentage of the clients served by NAFD members are charged under 21 U.S.C. § 841, the statute at issue in this case.

*Amici* have a strong interest in issues affecting defendants charged under section 841. The question presented in this case by the Petition for Certiorari, whether under section 841 drug quantity is an element of the offense or instead a sentencing factor, is in urgent need of resolution by this Court, given the uncertainty and confusion on this question in the lower courts and given the very significant effect that judicial fact-finding can have on the sentences meted out to drug offenders. *Amici* believe that this brief will assist the Court in evaluating the issues of statutory interpretation raised by the Petition and the constitutional implications of these issues, as well as provide perspective on the practical consequences of these issues for the courts, defendants, and the criminal justice system.

## SUMMARY OF ARGUMENT

The Petition for Certiorari in this case presents the exceptionally important question of whether the threshold drug quantities set forth under 21 U.S.C. § 841 are elements of separate offenses, or are merely sentencing factors. In affirming Petitioner's sentence in this case, the United States Court of Appeals for the First Circuit held that the statutory threshold drug quantities are not elements of the offense, but are sentencing factors to be determined by the trial judge under a preponderance of the evidence standard. Under the First Circuit's interpretation, the key factual determinant of the severity of the sentence is not required to be submitted to the jury and is not subjected to a requirement of proof beyond a reasonable doubt. The interpretation given section 841 by the First Circuit is incorrect as a matter of statutory construction and raises serious constitutional issues regarding the Sixth Amendment right to a jury trial and the due process requirement that all the elements of the crime be proved beyond a reasonable doubt.

*Amici* submit that the threshold drug quantities established in section 841 should properly be construed as elements of the offense, not as sentencing factors. This result is com-

pelled both by the language and structure of section 841 and by its legislative history, as well as by the historic understanding of the role of quantities and/or value as elements in drug and other crimes. Furthermore, the doctrine of constitutional doubt requires that the statute be interpreted so as to avoid the serious constitutional questions raised by First Circuit's treatment of drug quantities under section 841 as sentencing factors.

This Court should grant certiorari and resolve this issue now rather than later. At present, conflicting approaches among the United States Courts of Appeals have created significant confusion and difficulties with regard to when and what factual determinations under section 841 must be proved to the jury beyond a reasonable doubt. The D.C. Circuit interprets section 841 as establishing multiple offenses, with drug quantity an element. *See Graham v. United States*, 317 F.3d 262, 274 (D.C. Cir. 2003). Under the interpretation of drug quantities as sentencing factors, which has been adopted by a number of other circuits, including the First Circuit, drug quantity must sometimes be determined by the jury beyond a reasonable doubt and sometimes not, depending upon the circumstances of the case and upon the particular court's interpretation and application of this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In a third and novel approach, the Seventh Circuit has held that in drafting section 841, Congress, by failing to specify whether drug quantities were sentencing factors or elements, intentionally "l[eft] it to the judiciary to sort out who determines what facts, under what burden." *United States v. Brough*, 243 F.3d 1078, 1079 (7th Cir. 2001). *See generally* Pet. at 9-10.

Requiring a jury determination as to the threshold drug amounts set forth in section 841 and recognizing drug quantity as an element of the offense would result in a uniform rule of easy application. Moreover, adopting such as statutory interpretation will not result in a material increase in the workload of the trial courts. It is already the practice of federal prosecutors in many jurisdictions to charge drug type and quantity in indictments and to present that issue to the jury. *See United States v. Vazquez*, 271 F.3d 93, 114 (3d Cir. 2001) (en banc) (Becker, J., concurring) (noting that "[s]ince *Apprendi*, federal district courts have . . . submitt[ed] special

interrogatories to the jury for determination of drug type and quantity"), *cert. denied*, 536 U.S. 963 (2002). Indeed, the issue of drug quantity was submitted to the jury in this case, but the district court, applying a preponderance standard, determined that a larger amount than found by the jury was involved in the offense, resulting in the doubling of Petitioner's sentence.

Interpretation of the threshold drug quantities in section 841 as elements of the offense would eliminate anomalous and unfair results such as occurred in the present case. It would also simplify and/or eliminate the recurrent issues presented under section 841 on appeal under *Apprendi*. Treatment of drug quantity as an element of the offense will result in a fairer administration of the nation's drug laws and will accord with the intent of Congress in enacting section 841. For these reasons and the reasons set forth below, *amici* respectfully urge the Court to grant the Petition for Certiorari.

## ARGUMENT

### I. This Court Should Grant Certiorari and Clarify Whether the Threshold Drug Quantities Set Forth in Section 841(b) Are Offense Elements, Rather Than Merely Sentencing Factors

#### A. The Statutory Language and Structure Establish That Drug Quantities under Section 841(b) Were Intended As Elements Defining Separate Offenses

The First Circuit in this case incorrectly held that subsection (a) of 21 U.S.C. § 841 defines the elements of a single generalized offense of unlawfully distributing, manufacturing or dispensing a controlled substance and that the drug quantities set forth in subsection (b) are merely sentencing factors, subject to judicial fact-finding under a preponderance standard. *Amici* submit that the content, structure and wording of section 841 compel the conclusion that subsection (a) lists elements common to offenses of manufacturing, distributing and dispensing controlled substances, while subsection (b) establishes multiple separate specific offenses based upon the additional elements of drug type and quantity.

The wide range of penalties provided for by subsection (b) for offenses involving different quantities of different drugs

evidences Congress's intent to make drug quantity an element of the offense. Subsection (b) not only authorizes penalties ranging from probation to life imprisonment, but also establishes widely different maximum penalties for violations involving different quantities and/or types of drugs. Those penalties include a one-year maximum under section 841(b)(3), a three-year maximum under section 841(b)(2), a five-year maximum under section 841(b)(1)(D), a 20-year maximum under section 841(b)(1)(C), a 40-year maximum under (b)(1)(B), and a maximum of life under (b)(1)(A). The different violations possible under section 841(b) range from misdemeanor (section 841(b)(3)) to "serious drug offense" (section 841(b)(1)(A)). *See* 18 U.S.C. § 3559. Even with respect to the same drug type, penalties can vary significantly. *Compare, e.g.*, § 841(b)(1)(B)(vii) (providing a maximum of 40 years imprisonment for a violation involving "100 kilograms or more of a mixture or substance containing a detectable amount of marijuana") *with* § 841(b)(1)(D) (providing a maximum of 5 years imprisonment "in the case of less than 50 kilograms of marijuana"). As Judge Becker of the United States Court of Appeals for the Third Circuit has concluded, these "dramatic differences in the severity of punishment . . . signal Congress's intent to make drug type and quantity elements of the several offenses established under § 841." *Vazquez*, 271 F.3d at 113 (concurring opinion).

In *Jones v. United States*, 526 U.S. 227 (1999), this Court looked to the wide variations in penalties under the federal carjacking statute in determining that the subsections of that statute establish three separate offenses. The Court emphasized that the subsections at issue provided "steeply higher penalties" and "condition[ed]" those steeply higher penalties upon "further facts." *Jones*, 526 U.S. at 233. The Court reasoned that it was questionable that Congress would have intended that the "specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, . . . carry none of the [due] process safeguards that elements of an offense bring with them for a defendant's benefit." *Id.*; *see also Castillo v. United States*, 530 U.S. 120, 131 (2000) ("the length and severity of an added mandatory sentence . . . weighs in favor of treating such offense-related words as referring to an element"). Like the carjacking statute at issue in *Jones*, section 841 provides for wide variations in sentencing

and conditions "steeply higher" penalties upon further facts, namely the amount and type of drug involved. As in *Jones*, these considerations support the conclusion that Congress intended subsection (b) of section 841 to establish separate offenses defined by the elements of drug type and amount.

Contrary to the First Circuit's conclusion in this case, section 841(b) does not establish "a typical sentencing scheme." Pet. App. at 12a. Indeed, the range of penalties provided by section 841 -- probation to life imprisonment -- is not what is commonly understood to be a "sentencing range" at all. A sentencing range is commonly understood to be "limits fixed by law" within which a judge traditionally may exercise discretion "to determine the type and extent of punishment." *Apprendi*, 530 U.S. at 481-82. A range from probation to life imprisonment does not in fact limit judicial discretion. Section 841 establishes a typical sentencing scheme only if the various subparagraphs under section 841(b) are construed as setting separate sentencing ranges for separate, specifically defined offenses, the seriousness of which is measured by the elements of quantity and type of drug involved.

Further evidence of Congress's intent to establish separate offenses based on the elements of drug type and quantity is provided by the structure and wording of the relevant subsections under section 841(b). Each of these subsections has a two-part structure typical of complete criminal statutes, *i.e.*, a separate clause that defines the offense followed by sentencing provisions. For example, subparagraph (b)(1)(A) defines an offense that incorporates the elements of a violation of subsection (a) and "involv[es]" the additional elements of drug type and quantity as set forth in separately numbered subclauses (b)(1)(A)(i) to (viii).[2] Significantly, under the language of subparagraph (A) ("in the case of a violation . . . involving – (i) 1 kilogram or more . . ."), the drug types and quantities set forth in (i) to (viii) are grammatically linked to and describe the defendant's "violation." 21 U.S.C. §

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[2] *Cf. Castillo*, 530 U.S. at 124 (interpreting statutory language as "incorporating by reference the initial phrases that relate the basic elements of the crime and creating a different crime containing one new element, i.e., the use of carrying of a 'machinegun' during and in relation to a crime of violence").

841(b)(1)(A). The described violations are then followed by sentencing provisions set forth in unnumbered text beginning "such person shall be sentenced . . . ." *Id.* As is often the case in federal criminal statutes, the sentencing provisions are placed after the word "shall" and the elements of the violation precede the word "shall." *See Jones*, 526 at 233; *Harris v. United States*, 536 U.S. 545, 552 (2002).

Confirming that the first portion of subparagraph (b)(1)(A), with its numbered subclauses, is intended to set forth elements of the offense is the reference in the second portion of the subparagraph to "a violation of this subparagraph." That language is incompatible with the notion that the subparagraph merely sets forth sentencing factors. Rather, by referring to "a violation of this subparagraph," the subparagraph itself confirms that its function is to define a particular offense.

Subparagraph (b)(1)(B) has a structure identical to that of (b)(1)(A). Subparagraphs (b)(1)(C) and (D), as well as (b)(2), (3), (4), are similarly divided between initial phrases that set forth drug type and/or quantity so as to define a specific type of violation of subsection (a), and concluding clauses that set forth sentencing ranges.[3] Subparagraph (b)(1)(D), for example, begins with the offense-defining phrase "[i]n the case of less than 50 kilograms of marihuana . . . ," and sets forth the applicable penalties in language beginning, "such person shall . . . be sentenced to a term of imprisonment . . . ."

Moreover, although subsection (a) is a complete grammatical sentence, it is not a complete definition of a crime. As one legal scholar has stated:

What we mean by "crime" or an "offense" is simply

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[3] Significantly, the structure of these provisions is similar to that of 21 U.S.C. § 860(a), which provides for a greater penalty for persons who violate section 841 within 1000 feet of a school. Section 860(a), which is given the heading "Penalty," has uniformly been held to define an offense, and the defendant's location within 1000 feet of a school has uniformly been held to be an element that must be proved to the jury beyond a reasonable doubt. *See United States v. Harris*, 313 F.3d 1228, 1238-39 (10th Cir. 2002) (citing cases), *cert. denied*, 537 U.S. 1244 (2003).

> conduct that is forbidden by law and to which consequences, called punishment, will apply on the occurrence of stated conditions and following a stated process. *A crime is not merely any conduct forbidden by law; it is forbidden conduct for which punishment is prescribed* and which is formally described as a crime . . . .

Herbert Packer, *The Limits of the Criminal Sanction* 18 (1968) (emphasis added).[4] Section 841(a) merely declares certain general conduct unlawful.[5] Accordingly, subsection (a) "alone does not define a complete offense because it includes no punishment." *Vazquez*, 271 F.3d at 112 (Becker J., concurring). The statute contains no basic penalty or catchall minimum. Hence, "[a] jury verdict finding only that the defendant had committed the acts described in subsection (a), without more, would not render the defendant guilty of a crime requiring any ascertainable punishment." *Id.* It is only subsection (b) that defines particular categories of conduct as crimes and sets the range of penalties applicable to each.[6]

Some United States Courts of Appeals, in holding that drug quantities under section 841(b) are sentencing factors,

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[4] Indeed, it is black-letter law that a prohibition without a specified penalty does not create a crime. *See, e.g.*, Wayne R. LaFave, *Criminal Law* § 1.2(d), at 12-13 (4th ed. 2003) ("[A] crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime.").

[5] Section 841(a)'s prohibition is enforceable not only through criminal penalties, but through injunctive proceedings. *See, e.g., United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).

[6] In contrast, subsection (a) of 8 U.S.C. § 1326, the statute examined by this Court in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), both defines the offense *and* prescribes penalties, thus facilitating the conclusion that subsection (b) of section 1326 merely sets forth *additional* penalties based upon the sentencing factor of recidivism. *See Almendarez-Torres*, 523 U.S. at 230-31. Likewise, subsection (i) of 18 U.S.C. § 924(c)(1)(A), the statute at issue in *Harris*, also sets forth a minimum sentence for the basic offense, supporting the interpretation that subsections (ii) and (iii), which increase the minimum penalty if certain facts are present, contain sentencing factors, not elements. *See Harris*, 536 U.S. at 552-53. The fact that, unlike these statutes, section 841 contains no basic penalty or catchall minimum supports the conclusion that section 841(b) sets forth different violations with different elements.

have erroneously relied upon the headings "Unlawful Acts" and "Penalties" that appear in section 841 in the United States Code. *See, e.g., United States v. Lewis*, 113 F.3d 487, 489-91 (3d Cir. 1997); *United States v. Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991); *United States v. Moreno*, 899 F.2d 465, 471-74 (6th Cir. 1990); *see also United States v. Promise*, 255 F.3d 150, 170-71 (4th Cir. 2001) (Luttig, J., concurring). These headings, however, were not part of the statute as enacted by Congress, but "can be traced to the Office of the Federal Register, National Archives and Records Services, which added a reference to 'penalties' as a margin note to the predecessor of § 841(b) in the Statutes at Large simply for user convenience." *Vazquez*, 271 F.3d at 111 (Becker, J., concurring). When the Controlled Substances Act was reproduced in the United States Code, "the margin notes were converted into subsection headings by the codification committee, but have never been officially adopted by the Congress." *Id.*

Indeed, even if Congress itself had officially adopted the headings in section 841, judicial reliance upon them to hold that drug quantities and types are merely sentencing factors would be misplaced. As two legal scholars have stated with particular reference to section 841,

> [t]he insertion into some statutes of the word "penalties," in conjunction with the *McMillan* ruling, has led the circuits to conclude that all factual findings within "penalty" provisions are to be decided by the district court at sentencing. In fact, much like the Pennsylvania legislature declaring in the body of the statute itself that visible possession of a weapon is not an element of the offense, the courts have concluded that Congress has, by placing quantity determinations in the penalty section, accomplished the same thing without resorting to such explicit language. This seems clearly wrong – surely it is not too much to ask Congress to be explicit when serious additional penalties are at stake, particularly since traditional interpretation would mandate a contrary result.

Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania*, 22 Seattle Univ. L. Rev. 1057,

1095-96 (1999) (footnotes omitted).[7]

Judge Luttig of the Fourth Circuit has argued that section 841 establishes a single offense with a statutory maximum penalty of life imprisonment and that accordingly there can never be an *Apprendi* problem because application of drug quantity and type as sentencing factors will never will result in a penalty in excess of that statutory maximum. *See Promise*, 255 F.3d at 169-70 (Luttig, J., concurring). Judge Luttig's concurrence bluntly states the logical consequences of interpreting the drug quantities and types set forth in subsection (b) as sentencing factors. That reasoning, however, in fact highlights the impossibility that such an interpretation could be correct. Judge Luttig offers no other example of a statute that purportedly sets intermediate sentencing categories ranging from "not more than one year" for a misdemeanor drug offense, § 841(b)(3), to up to life imprisonment, conditioned on factual findings to be made by the sentencing judge, and *amici* know of no such statute. The "single offense" interpretation of section 841 supposes that Congress intended to do something it has never done before or since.[8]

In any case, the interpretation of section 841 as setting forth a single offense with a single overall sentencing range is a tortured reading of the statute. In fact, the statute sets forth a separate sentencing range, specifying both minimum and maximum sentences for each of the violations described in its subsections. Thus, for example, a violation "involving" 100 grams or more of heroin is subject to a minimum of 5 years imprisonment, and a maximum of 40 years, while a violation involving less than 50 kilograms of marihuana is subject to imprisonment for a term of "not more than 5

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[7] *Cf.* 21 U.S.C. § 860(a), which is headed "Penalty," but which has uniformly been held to define both the offense and the basic penalty. *See* n.3 *supra*.

[8] Moreover, the maximum penalty of life imprisonment is simply not available under the statute for every violation of subsection (a). Life is the maximum statutory penalty only for certain violations of subsection (a). There is little sense or meaning in asserting that under the statute life imprisonment is somehow theoretically the maximum penalty available for distributing, *e.g.*, less than 50 kilograms of marijuana or of a controlled substance in schedule V, when the statute clearly sets maximum penalties of five years and one year respectively.

years." 18 U.S.C. § 841(b)(1)(B) & (D). The statute provides no possibility for a life term in such cases. The statute's establishment of multiple sentencing ranges – as opposed to a series of increased minimums within an overall basic sentencing range, such as was at issue in *Harris* – supports an interpretation of the statute as setting forth different offenses, with separate additional elements.

In its decision in this case, the First Circuit, relying upon Judge Luttig's concurrence in *Promise*, opines that if section 841(b) is interpreted as defining separate offenses based on elements of drug type and quantities, the statute "would define as many as 350 different offenses." Pet. App. at 12a. According to the First Circuit, such an interpretation would somehow cause some unspecified practical "difficulty we think Congress did not intend." *Id.* Since drug types and threshold quantities are already routinely charged and submitted to the jury, *see Vazquez*, 271 F.3d at 114 (Becker, J., concurring), it is clear that no practical difficulty would result. Moreover, most drug types are not treated individually by section 841(b), but are referenced according to their grouping under five "schedules" initially set forth in 21 U.S.C. § 812 and refined from time to time in 21 C.F.R. § 1308.11 *et seq.* Indeed, one of Congress's primary purposes of section 841 was to simplify and consolidate the "plethora" of federal drug laws governing distributing and manufacturing offenses. *See Vazquez*, 271 F.3d at 108-09 (Becker, J. concurring). This goal was accomplished, however, not by establishing a single general offense, but by setting forth the elements common to all such offenses in subsection (a), and grouping offenses on a "double axis" of the additional elements of drug types and quantities in the various subparagraphs of subsection (b). *See id.* at 108-09. Under that relatively simple system, no "difficulty" is caused by holding that drug types and quantities are separate elements.[9]

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[9] The simultaneous possession of two types of drugs has uniformly been held to constitute two separate offenses for double jeopardy and other purposes. *See, e.g., United States v. Garcia-Rosa*, 876 F.2d 209, 216-17 (1st Cir. 1989); *United States v. Grandison*, 783 F.2d 1152, 1156 (4th Cir. 1986).

### B. The Traditional and Statutory Context of Section 841 Shows That Drug Quantity Is an Element of the Offense, Not a Sentencing Factor

A statute's "context" is also relevant to the determination of its meaning. *See Almendarez-Torres*, 523 U.S. at 228. The traditional and statutory context of section 841 supports interpreting drug quantity as an element of the offense, not a sentencing factor. Traditionally, amounts and values set forth in analogous criminal statutes such as those governing larceny and liquor sales were deemed elements of the offense. Furthermore, the interrelationship established by Congress between section 841 and certain other federal criminal statutes demonstrates Congress's intent to make drug quantities elements of separate offenses under section 841(b).

In its interpretation of section 841 in this case, the First Circuit, citing the federal sentencing guidelines, relied on the erroneous notion that drug quantity is a "classic" sentencing factor. Pet. App. at 11a. In fact, drug statutes themselves are a creation of the modern era, and, in any case, state drug laws typically treat threshold drug quantities as elements.[10] Moreover, drug quantities under the Controlled Substances Act are analogous to threshold quantities and values in other federal and state statutes, which historically have been treated as elements of the offense and required to be submitted to the jury and proved beyond a reasonable doubt. *See generally* Knoll & Singer, *supra*, at 1067-79.

For example, the Jones Act, as amended in 1931, included a proviso that made a violation of the National Prohibition

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[10] *See, e.g.*, Ala. Code § 13A-12-231(2); *Ex parte Washington*, 818 So. 2d 424 (Ala. 2001) ; Ariz. Rev. Stat. § 13-3405(B); *Arizona v. Virgo*, 947 P.2d 923 (Ariz. Ct. App. 1997); Del. Code Ann. tit. 16, § 4753A; Ga. Code Ann.§ 16-13-31; *Mallarino v. State*, 379 S.E.2d 114 (Ga. App. 1990); Idaho Code § 37-2732B; *State v. Portillopayan*, 977 P.2d 228, 231 (Idaho Ct. App. 1998); 720 IlCS 570/401; *People v. Harper*, 482 N.E.2d 312 (Ill. App. Ct. 1985) ("Where the grade of the offense depends on the amount of the drug involved . . . then the amount possessed by a defendant becomes an essential element of the offense"); Burns Ind. Code Ann. § 35-48-4-1; *Hall v. Indiana*, 403 N.E.2d 1382, 1390 (Ind. 1980); Iowa Code § 124.401; KRS § 218A.1421. *Cf. Jones*, 526 U.S. at 236-37 (looking to "state practice" in distinguishing between elements and sentencing factors).

Act by a sale of not more than one gallon of an alcoholic beverage punishable by a sentence not to exceed six months, while a violation that involved more than one gallon was punishable by five years in prison. *See id.* at 1071-72. Under these provisions, it was held that the fact that more than one gallon of liquor was involved was an "essential element[] of the offense." *E.g., Pace v. Aderhold*, 2 F. Supp. 261, 263 (N.D. Ga. 1932), *aff'd*, 65 F.2d 790 (5th Cir. 1933); *see also Olivito v. United States*, 67 F.2d 564, 565 (9th Cir. 1933). This federal precedent is in accord with traditional practice under earlier state laws criminalizing the sale of liquor. When such statutes "ma[d]e the offense or punishment vary with the quantity sold," it was necessary to allege and prove quantity. *See* J. Bishop, *Statutory Crimes* §§ 1039, 1047 (3d ed. 1901) (citing cases).

Likewise, under larceny and embezzlement statutes providing for sentences based upon the value of the property at issue, value was considered a "'material element of the offense charged'" such that "'it must not only be alleged, but like all other statutory elements defining the crime, it must be proved by competent evidence to the satisfaction of the jury beyond a reasonable doubt.'" Knoll & Singer, *supra*, at 1074-75 (quoting *Henry v. United States*, 263 F. 459, 461 (D.C. Cir. 1919)). Thus, the traditional "rule pervading the entire procedure in larceny is that the value of the thing stolen must be alleged and proved when the punishment or its degree depends on value." Bishop, *Statutory Crimes* § 427. Such statutes provide the traditional precedent for section 841.

The interaction of section 841 with other federal statutes also confirms that drug quantities under section 841 function as traditional elements, defining levels of offenses. In particular, a prior conviction under section 841(b)(1)(A) -- the most serious of the drug violations defined in 841(b) – may result in enhanced penalties if a defendant is later convicted under another federal statute. For example, under the "three strikes" law, a person convicted under federal law of a serious violent felony shall be sentenced to life imprisonment, if he or she has earlier been convicted of "one or more serious violent felonies and one or more serious drug offenses." 18 U.S.C. § 3559(c)(1)(A)(ii). For this purpose, a "serious drug

offense" includes an offense punishable under section 841(b)(1)(A). 18 U.S.C. § 3559(c)(2)(H). For a prior conviction to be used in this way, "an earlier factfinder (e.g., a unanimous federal jury in the case of a federal crime) [must have] found that the defendant in fact committed that earlier individual crime." *Richardson v. United States*, 526 U.S. 813, 822 (1999). Thus, section 3559 clearly contemplates that the drug quantity necessary to constitute a violation under section 841(b)(1)(A) will have been proved beyond a reasonable doubt to the jury.

Similarly, prior convictions under section 841 "for which a maximum term of imprisonment of ten years or more is prescribed by law" may result in enhanced penalties if the defendant is later convicted of a violation of 18 U.S.C. § 922(g). *See* 18 U.S.C. § 924(e). Again, under *Richardson*, for this provision to be operative, the facts (i.e., drug type and quantity) that suffice for a maximum term of ten years or more under section 841 must have been proved to a jury beyond a reasonable doubt. Thus, the consequences Congress has prescribed for certain prior convictions under section 841 demonstrate Congress's intention to establish multiple separate offenses based upon the elements of drug type and quantity.

The First Circuit in this case erroneously concluded that if it ruled that the threshold drug quantities listed in section 841(b)(1)(A)-(C) constituted elements, it "would essentially abolish the [federal sentencing guidelines] because the jury would be required to make findings as to all facts that may be relevant to sentencing ranges and potential adjustments." Pet. App. 15a. To the contrary, Congress' use of threshold drug quantities as statutory elements of drug offenses does not preclude concomitant use of drug quantities as sentencing factors under the sentencing guidelines.[11] Indeed, drug quantities under the federal sentencing guidelines are calibrated so as to mesh precisely within the larger quantity

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[11] In any event, the views of the United States Sentencing Commission cannot change the meaning of a Congressional enactment. *See Neal v. United States*, 516 U.S. 284, 291-95 (1996).

ranges set forth in section 841.[12] Accordingly, the statute and guidelines function together, with the statute setting forth threshold drug quantities that are necessary elements of the offense, and the guidelines making finer distinctions within the larger statutory gradations.[13] Moreover, in contrast to the large gradations in threshold drug amounts in section 841(b), the "incremental" gradations in the sentencing guidelines "are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration." *See Harris v. United States*, 536 U.S. 545, 554 (2002). Thus, the fact that the federal sentencing guidelines define base offense levels for drug violations by reference to drug quantities does not support the argument that the drug amounts set forth in section 841(b) are only sentencing factors and not elements of the offense. Contrary to the First Circuit's assertion, a statutory interpretation of section 841(b) as establishing drug quantity and type as elements of different levels of offenses would not disrupt the functioning of the federal sentencing guidelines. Rather, the jury's finding as to drug quantity would simply confine the sentencing judge's factual findings to the "finer" guideline quantity ranges applicable to the offense of which a defendant had been convicted.

In short, far from "abolishing" the guidelines, under the

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[12] For example, with regard to violations involving cocaine base, section 841(b)(1)(A) applies to amounts of 50 grams or more. Within offenses under section 841(b)(1)(A), the federal sentencing guidelines distinguish between (i) at least 50 grams of cocaine base but less than 150, (ii) at least 150 grams but less than 500, and (iii) at least 500 grams but less than 1.5 kilogram. *See* U.S.S.G. § 2D1.1. Similarly, section 841(b)(1)(B) applies to amounts of cocaine base from at least 5 grams to less than 50. Within offenses under that subsection, the federal sentencing guidelines distinguish between (i) at least 5 grams but less that 20, (ii) at least 20 grams but less than 35, and (iii) at least 35 grams but less than 50. *See id.*; *see also id.*, Commentary, "Background" (stating that "[t]he base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute," but provide "finer distinctions").

[13] Significantly, the Guidelines themselves expressly contemplate that a defendants are "convicted under" the various subparagraphs of section 841(b)(1)(A), (B), and (C), and specifically treat "death or serious bodily injury" resulting from an offense under those subparagraphs not as an "offense characteristic" but as something that must be established by the "offense of conviction." *See* U.S.S.G. § 2D1.1(a).

interpretation of section 841 urged by Petitioner and *amici*, the statute would operate together with the guidelines. The statute would define various levels of offenses based on threshold quantities, and the guidelines would permit a sentencing judge to make finer factual determinations by a preponderance of the evidence as to actual drug quantity, consistent with the statutory threshold amount found by the jury. Moreover, such an interpretation of section 841 accords with traditional categories of "elements" and with the relationship between section 841 and other criminal statutes.

### C. The Legislative History of Section 841 Shows That Drug Quantity Is an Element of the Offense

The legislative history of section 841 confirms that it is correct to interpret threshold drug quantities as offense elements. The legislative history of section 841 contrasts markedly with the legislative history of 8 U.S.C. § 1326, described by this Court in *Almendarez-Torres*. In that case, this Court held that, under section 1326, a defendant's prior felony convictions were merely sentencing factors and not elements of the crime of illegal reentry to the United States following a previous deportation. The legislative history of section 1326, as described by this Court, was entirely devoid of any indication that prior felony convictions were meant to be anything other than sentencing factors. Indeed, this Court emphasized the fact that the legislative history of that statute "speaks about, and *only about*, the creation of new penalties" and "contains no language at all" indicating that Congress intended to create separately defined substantive crimes. *Almendarez-Torres*, 523 U.S. at 234 (emphasis added).

Unlike the legislative history of section 1326, the legislative history of section 841 contains numerous instances of language indicating that Congress understood that different drug types and different threshold drug quantities defined different substantive offenses. *See Vazquez*, 271 F.3d at 109-10 (Becker, J., concurring). For example, in 1980 when Congress amended the statute to include provisions relating to the quantity of marijuana involved in an offense, both the House and Senate Reports reflect that Congress intended quantity to function as an element with respect to marijuana offenses. The Reports state: "Individuals *convicted* of trafficking in over 1,000 pounds would be subject to a maximum

15 year prison sentence . . . " H.R. Rep. No. 96-936, at 13 (1980) (emphasis added); S. Rep. No. 96-916, at 14 (1980) (emphasis added). In 1984 when Congress amended section 841 to account for drug quantity for controlled substances other than marijuana, the Senate Report indicates that Congress created "a new subparagraph (A) under section 841(b)(1) that would provide, for *offenses* involving large amounts of particularly dangerous drugs, higher penalties than those now provided under section 841." S. Rep. No. 98-225, at 258 (1983) (emphasis added). As Judge Becker stated, the "use of the plural 'offenses' indicates Congress's intention to create within the single statute a multitude of separate crimes depending on drug type and quantity. " *Vazquez*, 271 F.3d at 110 (Becker, J., concurring).

In 1986 when Congress amended section 841 to create separate subparagraphs (A) and (B) under section 841(b)(1), and to include mandatory minimum sentences under those subparagraphs, the legislative history indicates that Congress understood that prosecutors would be required to introduce evidence of drug quantity during trial in order to obtain a conviction. *See id.* (citing H.R. Rep. No. 99 -845, at 12 (1986) (Congress had been informed by U.S. Attorneys that they would be able to meet the evidentiary burden for proving quantity to the jury)). Moreover, like the 1980 House and Senate Reports, the 1986 House Report specifically refers to persons "convicted under" subparagraphs (b)(1)(A) and (B), again indicating the Congressional understanding that those subparagraphs set out separate substantive offenses. *See* H.R. Rep. No. 99-845, at 12 (1986). It can be presumed that Congress was aware of the legal distinction between the phrases "convicted under" and "sentenced under" and would have used the latter had it meant drug quantity and type to be sentencing factors, rather than elements of substantive offenses. *See Vazquez*, 271 F.3d at 110 (Becker, J., concurring).

In short, the legislative history contains definite and repeated indications that Congress intended the threshold drug quantities specified under section 841(b) to be elements of particular offenses. The legislative history contains no such

indications,[14] much less any express statement, that Congress intended drug quantities to function as sentencing factors to be decided by the sentencing judge under a preponderance of the evidence standard.

## II. The Canon of Constitutional Avoidance Requires Interpreting the Drug Quantities in Section 841 as Elements Defining Separate Offenses

It is a "cardinal principle" of federal statutory construction that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Jones*, 526 U.S. at 239. *Amici* respectfully submit that this principle of statutory construction requires the drug types and threshold drug amounts set forth in section 841(b) to be treated as elements of the offense.

Under this Court's constitutional jurisprudence, "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum,' whether the statute calls it an element or a sentencing factor, 'must be submitted to a jury and proved beyond a reasonable doubt.'" *Harris*, 536 U.S. at 550 (quoting *Apprendi*, 530 U.S. at 490). Under that standard, there are indisputably instances in which it is unconstitutional to treat the drug

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[14] The First Circuit points to the fact that, when section 841 was first enacted in 1970, the House Conference Report referred to the sentencing procedures as giving "maximum flexibility to judges." Pet. App. at 11a. Section 841 as passed in 1970 contained no drug quantities, but set possible penalties solely in accordance with the type of controlled substance involved in the violation. The reference to "maximum flexibility" appears to refer to the fact that the statute permitted a judge to impose either fines or prison terms (with no statutory minimums) or both, abolishing the prior mandatory sentences. *See Warden v. Marrero*, 417 U.S. 653 (1974) (describing pre-1971 federal drug sentencing); *see also* 18 U.S.C. § 841(b) (1970). Contrary to the First Circuit's assertion, the phrase quoted from 1970 legislative history sheds no light on Congress's intent in amending the statute more than a decade later to include drug quantities.

types and amounts set forth in section 841(b) as sentencing factors, because such sentencing factors would impermissibly "swell the penalty" above the maximum provided for the acts proved to the jury beyond a reasonable doubt. *Id.* at 561-62. Under *Jones* and *Apprendi*, an interpretation of the drug amounts and drug types set forth in the statute as sentencing factors is subject to grave constitutional doubt

In *Jones*, this Court looked to the doctrine of constitutional doubt in holding that the federal carjacking statute, 18 U.S.C. § 2119, set forth basic and aggravated offenses, distinguished by the elements of "serious bodily injury" and "death." 526 U.S. at 239. In refusing to interpret "serious bodily injury" and "death," as mere sentencing factors, the Court stated

> If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment.

*Id.* at 243-44. The same serious constitutional doubt raised in *Jones* exists if drug amounts under section 841 are treated as mere sentencing factors. Under section 841, a jury finding of fact necessary for a maximum five year sentence – namely a violation involving less than 50 kilograms of marihuana under section 841((b)(1)(D) – would open the door to judicial factfinding sufficient for a sentence of 40 years or life under subsections (b)(1)(B)(vii) (100 kilograms or more of marijuana) and (b)(1)(A)(vii) (1000 kilograms or more).

Under *Jones*, the fact that section 841 contemplates such increases in the maximum sentence available based upon drug quantity requires that the statute be interpreted as setting forth separate offenses based upon the elements of drug type and quantity. Because it is not reasonable to suppose that Congress intended some drug quantities under the statute to be elements and others to be sentencing factors, the doctrine of constitutional doubt requires that all drug quantities under the statute be interpreted as elements.

Moreover, such an interpretation accords with the traditional understanding of the "constitutional limits beyond which [Congress] may not go" in defining the elements of a crime, which had been addressed by this Court only a few years before Congress's 1980 amendment of section 841 to include drug quantities. *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Congress in amending section 841 should be presumed to have "legislate[d] in light of such constitutional limitations. *Harris*, 536 U.S. at 556. In *Mullaney*, this Court found unconstitutional a Maine statute under which Maine established a "single generic offense of felonious homicide" with "three distinct punishment categories," distinguished by the facts of intent or criminal recklessness. Under Maine law, "these facts of intent" were "not general elements of the crime" but "b[ore] only on the appropriate punishment category." 421 U.S. at 698-99. The result was that under the Maine statute, "once the State proved the elements which Maine required it to prove beyond a reasonable doubt the defendant faced 'a differential in sentencing ranging from a nominal fine to a mandatory life sentence.'" *McMillan v. Pennsylvania*, 477 U.S. 79, 87 (1986) (quoting *Mullaney*, 421 U.S. at 700; contrasting the provision of the Pennsylvania Mandatory Minimum Sentencing Act upheld in *McMillan* with the Maine statute invalidated in *Mullaney*). Congress in light of *Mullaney*'s strictures on "redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment," 421 U.S. at 698, must be held to have intended the drug amounts specified in section 841 to be elements of the offense to be submitted to the jury and found beyond a reasonable doubt.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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